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Issue date: 07Feb2002

IN THE MATTER OF:
Tod N. Rockefeller
Complainant,

CASE NO.: 2002-CAA-0005

v.

United States Department of Energy

Respondents

ORDER OF REMAND

Tod N. Rockefeller (herein "Rockefeller"), the Complainant, filed a whistleblower complaint against the Department of Energy ("DOE"), alleging violations of Section 322(a) (1-3) of the Clean Air Act, (CAA) 42 U.S.C 7622; Section 7001(a) of the Solid Waste Disposal Act, (SWDA) 42 U.S.C 6971; Section 110(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, (CERCLA) 42 U.S.C 9610; and Section 211 of the Energy Reorganization Act of 1974, as amended, (ERA) 42 U.S.C 5851. The Complainant is represented by Edward A. Slavin, Esquire, St. Augustine, Florida, and the Respondent by Elizabeth Rose, Esquire, Acting Chief Counsel, Department of Energy, Carlsbad Field Office, Carlsbad, New Mexico.

This is the sixth in a series of cases that allege similar facts. In a decision, rendered by another administrative law judge, the claims brought in cases one to five were determined to be the same and after reviewing the facts, the newer claims were considered to be barred by collateral estoppel. See Case No. 1999-CAA-0004, March 10, 1999. The Administrative Review Board has issued a final decision in the first four Rockefeller cases on October 31, 2000, dismissing them. ***Rockefeller v. U.S. Dep't of Energy***, ARB Nos. 99-002, 99-067, 99-068 and 99-063, ALJ Nos. 1998-CAA-10 and 11, 1999-CAA-1, 4 and 6, appeal docketed, No.00-9545 (10th Cir. Dec. 28, 2000). The final case was dismissed on other grounds on May 30, 2001; ARB No. 00-039, ALJ No. 1999-CAA-21 ***Rockfeller v. Carlsbad Area Office, U.S. Dept. of Energy***. These were appealed by Rockefeller to the Tenth Circuit (10th Cir. Nos. 00-9545, 01-9529) and were subsequently dismissed on November 20, 2001 for lack of prosecution pursuant to 10th Cir. R. 42.1.

Currently before me are:

1. Complainant's Motion for Partial Summary Judgment regarding Rockefeller's status as an employee of DOE.
2. Respondent's Motion for Summary Judgment.
3. Complainant's Motion to Remand.
4. Complainant's request for a further continuance.

The complaint in this case is not artfully drafted and several documents were attached to it and incorporated by reference as if set forth at length. OSHA found it was without merit, based in part because "his complaint fails to establish the elementary requirement that Respondent has been

responsible for adversely affecting his status as an employee or his status as an ex-employee."

Counsel argues that Rockefeller was *pro se* when he drafted the complaint and that I should read in matters consistent with Rockefeller's theory of the case, as expressed by the request for hearing, filed after Counsel was obtained. In his request for hearing, Counsel addressed blacklisting, although that word does not appear in Rockefeller's complaint. *Pro se* pleadings are to be construed liberally, ***Hasan v. Sargent and Lundy***, ARB No. 01-001, ALJ No. 2000-ERA-7 (ARB Apr. 30, 2001). In ***Hasan***, although Complainant's pleadings were inartfully drafted, the Secretary had been able to discern the basis of his argument. *See also* ***Bonanno v. Northeast Nuclear Energy Co.***, 92-ERA- 40 and 41 (Sec'y Aug. 25, 1993), where the Secretary did not hold Complainant to the same standards for pleadings as if he were represented by counsel.

The Complaint speaks to several matters that do not entitle the Complainant to jurisdiction under the whistleblower acts, and he attempts to raise matters that have been finally adjudicated in several earlier cases that are administratively final, but he did allege that:

> 18. On 7/3/01 Complainant learned of Respondents* Slanderous Smear Campaign against him when he discovered and obtained a letter about him dated 6/14/01 which was issued to at least six locations across town. See Enclosure F.

Enclosure F was not attached to the copy of the complaint sent to me by Counsel for Civil Rights Department of Labor, Dallas. The complaint does state that it sounds in retaliation under the whistleblower statutes.

Subsequently, Rockefeller submitted certain proposed stipulations, by counsel in his "Proposed Stipulations", numbers 13 through 15, appearing on page 5 of Complainant's Prehearing Exchange. These, in essence, accuse *opposing counsel* of committing certain acts of blacklisting. He listed her as the first witness on witness list. She purportedly blacklisted Rockefeller to six entities or persons. Who these persons are and their relationship to Rockefeller is unclear. These facts may be crucial in determining whether Rockefeller has employee status under the acts.

This case was originally set for January 15, 2002 and after a conference with the parties was reset for February 20. Complainant has filed a notice of conflict and has requested a new date. Respondent advises that if new counsel has to be obtained to try the case, two weeks preparation will be needed. DOE has not filed its Prehearing Exchange, pending resolution of this matter. I gave her an opportunity to advise me how to proceed, but as of this date counsel has not advised me whether she will continue to represent her client.

Although the OSHA investigation report describes that a letter was sent about the Complainant, it accepts that, "None of these officials or managers caused any adverse effect on Complainant*s non-exsistent [sic] employment status."

After the OSHA investigation, with the request for hearing, Complainant requested partial summary judgment on the issue whether Rockefeller should be considered to be an "employee" in this action. He also requested a remand for a "proper" investigation.

In response, DOE argues that the complaint does not establish blacklisting. Besides the allegation that derogatory information was distributed about him, Rockefeller also alleged an altercation in a restaurant, but fails to set forth how that may affect an employment relation with DOE.

In its Motion to Dismiss, DOE alleges that Rockefeller*s claim of blacklisting, "raised in the Rockefeller VI and not in the instant case", is barred by the doctrine of collateral estoppel or issue preclusion, "since the issues are the same as those raised and decided upon by the Department of Labor*s Administrative Review Board".... DOE did not attach affidavits or provide any details concerning who wrote the letters alleged in stipulations 13 to 15, and did not attach affidavits from the recipients, so there is an open question regarding Rockefeller's status as an employee under the whistleblower acts. As Rockefeller has filed the prior claims, it is possible that he is entitled to status as a whistleblower. On the other hand, Rockefeller has not asserted how he was impacted.

Whistleblower provisions "are intended to promote a working environment in which employees are relatively free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment." ***Passaic Valley Sewerage Comm'rs v. Department of Labor***, 992 F.2d 474, 478 (3d Cir. 1993). A blacklist is defined as a list of persons or organizations that have incurred disapproval or suspicion or are to be boycotted or otherwise penalized.[1] Therefore, blacklisting is a form of reprisal.[2] "Blacklisting" is marking an individual "for special avoidance, antagonism, or enmity on the part of those who prepare the list or those among whom it is intended to circulate." ***Black's Law Dictionary***, 154 (5th Ed. 1979). "Blacklisting is the quintessential discrimination, i.e., distinguishing in the treatment of employees by marking them for avoidance." ***Leveille v. New York Air National Guard***, 94-TSC-3 and 4 (Sec'y Dec. 11, 1995). Blacklisting is "insidious and invidious [and] cannot easily be discerned." ***Egenrieder v. Metropolitan Edison Co./G.P.U.***, 85-ERA-23 (Sec'y Apr. 20, 1987). Blacklisting violates whistleblower laws regardless of the recipient of the information. See ***Earwood v. Dart Container Corp.***, 93-STA-16 (Sec'y Dec. 7, 1994) and ***Gaballa v. The Atlantic Group, Inc***., 94-ERA-9 (Sec'y Jan. 18, 1996)(reference checking company). Under the Clean Air Act[3], the following is set forth, as pertinent:

(a) Discharge or discrimination prohibited:

No employer may discharge any employee or otherwise discriminate against any employee with

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[1] http://www.dictionary.com/cgi-bin/dict.pl?term=blacklisting

[2] Whistleblower provisions do not protect workers from unreasonable or arbitrary actions on the part of an employer -- rather, they only protect workers from actions taken in retaliation for engaging in activities protected by the ERA. ***Collins v. Florida Power Corp***., 91-ERA-47 and 49 (Sec'y May 15, 1995). Whistleblowing is not directly concerned with safety standards, only the deviation from or the flouting of them. ***Norris v. Lumbermen's Mut. Casualty Co.***, 881 F2d 1144 (1st Cir. 1989). The federal "whistleblower" statutes promote enforcement of environmental laws by protecting employees who aid a government enforcement agency. ***Willy v. Coastal Corp***., 855 F.2d 1160 (5th Cir. 1988).

[3] 42 U.S.C.A. § 7622 United States Code Annotated Title 42. The Public Health and Welfare Chapter 85--air Pollution Prevention and Control Subchapter Iii--general Provisions § 7622. Employee protection.

respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--

(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan,

(2) testified or is about to testify in any such proceeding, or

(3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

(b) Complaint charging unlawful discharge or discrimination; investigation; order

(1) Any employee who believes that he has been discharged or otherwise discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor (hereinafter in this subsection referred to as the "Secretary") alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the person named in the complaint of the filing of the complaint.

(2)(A) Upon receipt of a complaint filed under paragraph (1), the Secretary shall conduct an investigation of the violation alleged in the complaint. Within thirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph. Within ninety days of the receipt of such complaint the Secretary shall, unless the proceeding on the complaint is terminated by the Secretary on the basis of a settlement entered into by the Secretary and the person alleged to have committed such violation, issue an order either providing the relief prescribed by subparagraph (B) or denying the complaint. An order of the Secretary shall be made on the record after notice and opportunity for public hearing. The Secretary may not enter into a settlement terminating a proceeding on a complaint without the participation and consent of the complainant.

(B) If, in response to a complaint filed under paragraph (1), the Secretary determines that a violation of subsection (a) of this section has occurred, the Secretary shall order the person who committed such violation to (i) take affirmative action to abate the violation, and (ii) reinstate the complainant to his former position together with the compensation (including back pay), terms, conditions, and privileges of his employment, and the Secretary may order such person to provide compensatory damages to the complainant. If an order is issued under this paragraph, the Secretary, at the request of the complainant, shall assess against the person against whom the order is issued a sum equal to the aggregate amount of all costs and expenses (including attorneys' and expert witness fees) reasonably incurred, as determined by the Secretary, by the complainant

for, or in connection with, the bringing of the complaint upon which the order was issued.

(g) Deliberate violation by employee. Subsection (a) of this section shall not apply with respect to any employee who, acting without direction from his employer (or the employer's agent), deliberately causes a violation of any requirement of this chapter.

The implementing regulations state in part pertinent:

(b) Any employer is deemed to have violated the particular federal law and the regulations in this part if such employer intimidates, threatens, restrains, coerces, *blacklists*, discharges, or in any other manner discriminates against any employee because the employee has:

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a) or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;

(2) Testified or is about to testify in any such proceeding; or

(3) Assisted or participated, or is about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute.

(Emphasis added). 29 CFR §24.2(b). Note that there are similar provisions in the other acts involved in this case.

The standard for granting summary decision is set forth at 29 C.F.R. §18.40(d). This section is derived from Fed. R. Civ. P. 56, which permits an ALJ to recommend summary decision for either party where "there is no genuine issue as to any material fact." 29 C.F.R. §18.40(d). The non-moving party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. ***Gillilian v. Tennessee Valley Authority***, 91-ERA-31 (Sec'y 8/28/95) (Citing ***Anderson v. Liberty Lobby, Inc***., 477 U.S. 242, 247 (1986); ***Celotex Corp. v. Catrett***, 477 U.S. 317, 324 (1986)). The determination of whether a genuine issue of material fact exists must be made viewing all the evidence and factual inferences in the light most favorable to the non-movant. Id. (Citing ***OFCCP v. CSX Transp., Inc***., 88-OFC-24 (Asst. Sec'y 10/13/94)). See Also ***Laniok v. Advisory Committee***, 935 F.2d 1360 (2d Cir. 1991) (denying summary judgment based on the existence of genuine issues of material fact which the trial court had incorrectly assumed in favor of moving party).

Rockefeller, having filed and participated in the five prior whistleblower actions bearing his name, "commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statutes listed in § 24.1(a)" and is therefore a member of a class protected under 29 CFR §24.2. Whether he is a current or former DOE employee, he is protected from blacklisting and adverse actions arising out of the employment relationship if the alleged adverse action was a result of it. ***Robinson v. Shell Oil Co.,*** 519 U.S. 337 (1997). However, whether the activity complained about bears any relationship to the prior complaints or is in retaliation for having filed them, or whether he has been injured as a result of activity he has described in his complaint has yet to be determined. Therefore, absent concrete evidence, there are unresolved material facts at issue. In its decision letters, OSHA determined that Complainant was not Respondent's

employee; however, no legal basis for the determination was provided. This may be a valid basis to remand. *See* ***Dempsey v. Fluor Daniel, Inc***., 2001-CAA-5 (ALJ June 27, 2001).

Apparently, OSHA did not have Enclosure F when the determination was made, and did not contact the addressees.

Also the allegation that DOE Counsel is personally involved is a new issue that obviously was not contemplated when the OSHA letter was sent. This issue also complicates proceeding to a heaing set for February 20, as counsel may/may not be able to participate.

The ABA Model Rule of Professional Conduct 3.7 ("Lawyer as Witness") provides:

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
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> (1) the testimony relates to an uncontested issue;
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> (2) the testimony relates to the nature and value of legal services in the case; or
>
> (3) disqualification of the lawyer would work substantial hardship on the client.
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> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

None of the exceptions apply here if DOE counsel is called.

As I stated *supra*, given a liberal reading of the complaint, coupled with the allegation concerning counsel, material facts concerning this matter remain open to development. I had expected Counsel to brief the law on this issue. I had expected Counsel to advise me whether they had made arrangements for the contingency if substitute counsel is necessary. I received a response, but it is unverified and does not speak to the issue regarding status, and other matters, such as privilege that have not been brought up by the parties, but are probably relevant.

In a hearing January 30, Counsel for Respondent advised that she does not have any objection to remand, as the matters at issue regarding the allegations against her are new issues that were not before OSHA as the details had not been fully presented at that time.

Given the state of this proceeding, the interests of justice and judicial economy require that the evidentiary, tactical and even the ethical problems involved must be ready prior to hearing. As Complainant has requested remand, time is not of the essence. I am aware that parties might attempt to use the ethical rule as a litigation tactic. “The Court must therefore be careful to determine whether the testimony of the implicated attorney is genuinely necessary or merely a fabrication of his adversary." ***Mainstream Loudoun v. Board of Trustees of Loudoun County Library***, 24 F.Supp.2d 552 (E.D.Va., 1998). In requesting the disqualification of an attorney on this basis, Model Rule 3.7(a) "places a higher standard of proof on the movant." ***Weeks v. Samsung Heavy Industries Co., Ltd.***, 909 F.Supp. 582, 583 (N.D.Ill.1996); ***World Youth Day, Inc. v. Famous Artists Merchandising Exchange, Inc***., 866 F.Supp. 1297, 1299 (D.Col.1994); ***Chapman Engineers, Inc. v. Natural Gas Sales Co., Inc***., 766 F.Supp. 949, 958 (D.Kan.1991). "The right to be represented by counsel of choice is an important one, subject to override only upon a showing of compelling circumstances." Id. at 954. The "Lawyer-witness rule" prohibits an attorney who may be called as a witness only from acting as an advocate at trial, and not from assisting with trial preparation. ***Mainstream Loudoun***,

supra. I am also aware that this procedure is subject to abuse if it is nothing more than a "fishing expedition". However, as Respondent does not object, the case is remanded for the reasons set forth above.

Therefore, it is **ORDERED** that:

1. The hearing set for February 20 is cancelled.

2. Complainant's Motion For Remand to OSHA for further investigation be, and it hereby is, granted; and

3. Complainant's Motion for Partial Summary Judgment is premature as material facts surrounding this issue are not in the record; and

4. Respondent's Motion for Summary Judgment is denied at this time as unresolved material facts are at issue.

SO ORDERED.

A
Daniel F. Solomon
Administrative Law Judge

NOTICE: This Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within 10 business days of the date of this Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C.F.R. §§ 24.7(d) and 24.8.